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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Memorandum of Ex Parte Presentation

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: CC Docket No. 01-338, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers;
CC Docket No. 96-98, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; and
CC Docket No. 98-147, Deployment of Wireline Services Offering Advanced Telecommunications Capability

Dear Ms. Dortch:

On September 27, 2002, Don Cain, Gary Phillips, Christopher Heimann, Jim Lamoureux and the undersigned representing SBC Communications, Inc. (SBC), met with Michelle Carey, Tom Navin, Rob Tanner, Claudia Pabo, Elizabeth Yockus, Ian Dillner, Daniel Shiman, Brent Olson, Mike Engel, Ben Childers, Julie Veach, and Jeremy Miller of the Competition Policy Division of the Wireline Competition Bureau and Jerry Stanshine of the Network Technology Division of the Office of Engineering and Technology.

The purpose of the meeting was to discuss issues associated with the appropriate unbundling of loops and transport in the context of the Commission's Triennial Review. The attached material was discussed during the course of the meeting. This letter transmits one copy containing **confidential information** already included in the record of the Triennial Review and two copies **redacted for public inspection**.

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Please contact the undersigned at (202) 326-8847 should you have any questions.

Sincerely,

Attachment

cc: Michelle Carey (w/o attachment)
Tom Navin (w/o attachment)
Rob Tanner (w/o attachment)
Claudia Pabo (w/o attachment)
Elizabeth Yockus (w/o attachment)
Ian Dillner (w/o attachment)
Daniel Shiman (w/o attachment)
Brent Olson (w/o attachment)
Mike Engel (w/o attachment)
Ben Childers (w/o attachment)
Julie Veach (w/o attachment)
Jeremy Miller (w/o attachment)
Jerry Stanshine (w/o attachment)

Interoffice Transport and Local Loops

September 27, 2002

Overview

- The Commission must eliminate unbundling for loop and transport facilities where alternatives to UNEs are being used or reasonably could be deployed.

- The Commission should not permit CLECs to purchase high-capacity loops and/or loop-transport combinations as a substitute for special access, or to serve competitive markets — such as the long distance or wireless markets.

Guiding Legal Principles

- Elements that are properly unbundled are "bottleneck facilities" that are "very expensive to duplicate," as opposed to those which are "sensibly duplicable." *Verizon v. FCC.*
- "To rely on cost disparities that are universal as between new entrants and incumbents in *any* industry," rather than those "linked (in some degree) to natural monopoly," is to "invoke a concept too broad . . . to be reasonably linked to the purposes of the Act's unbundling provisions." *USTA v. FCC.*
- Nothing in the Act is "a license . . . to inflict on the economy" the costs of unbundling in competitive markets where there is "no reason to think doing so would bring on a significant enhancement of competition." *USTA v. FCC.*
- Unbundling "imposes costs" by "spreading the disincentive to invest" and "creating complex issues of managing shared facilities." *USTA v. FCC.*

Alternative Local Fiber is Widely Available

- All but nine of the top 100 MSAs are served by at least three CLEC fiber networks.
  - In *USTA*, the D.C. Circuit, noting that 47 of the top 50 areas had 3+ transport competitors, questioned how CLECs could be impaired where an element is "significantly deployed on a competitive basis." Slip Op. 13.
- 1,800 CLEC fiber networks in the 150 largest MSAs.
- Competitive carriers have deployed 339,000 route miles of fiber (ALTS data), which compares to 362,000 miles for ILECs (AT&T data). A significant amount of CLEC fiber is local.

CLEC Last Mile Facilities

- CLECs serve between 11.5 and 18.5 million, or 25 to 42 percent, of their business lines using alternative (non-UNE) last mile facilities.
- CLECs connect to 380,000 office buildings.
- CLECs serve many of their high cap customers over their own facilities:
  - CLECs have purchased only 72,000 high capacity loops (virtually all DS1s) in all four RBOC regions
  - CLECs have purchased only 140 DS3 loops and none above DS3

A Vibrant Wholesale Fiber Market Exists

- Wholesale suppliers provide a real alternative to ILEC fiber. For example:
  - FiberLoops.com, a fiber clearinghouse, lists competitive fiber for 175 cities, identifies fiber hotels, and has developed a directory identifying 2000 local fiber networks from over 100 different companies.
  - American Fiber Systems - offers a 'turnkey' fiber solution.
  - Utilities possess one-third of the nation's fiber infrastructure and rights-of-way, which they supply to carriers. Half of new metro networks are being built by utilities.
- These suppliers connect end users to fiber rings, IXC pops, and ILEC Central Offices.

CLECs Can Extend Networks to Reach New Customers

- Because business customers are clustered in concentrated areas, CLECs readily can extend their networks incrementally to reach new customers by adding new spurs to existing fiber rings.
- CLECS tout their ability to reach off-net customers (*e.g.*, Time Warner).
- Wholesale suppliers also offer to extend to off-net sites.
    - AFS, for example, offers to connect off-net buildings "at a convenient cost per linear foot" using a "complete turn-key solution" handling "every aspect of the process," including route development, right-of-way procurement, construction, monitoring and maintenance.

CLECs Are Not Impaired By Purported Disadvantages of Alternative Fiber

- CLEC deployment and use of alternative fiber shows they are not impaired without access to a single "ubiquitous" fiber network.
- CLECs need not match ILECs' scale -- through targeted investment they can reach their customers.
- No timing disadvantage -- vibrant wholesale market exists today; resale and ILEC services can serve as a bridge to fill any gaps while alternative facilities are deployed.

Normal Business Risk Is Not Impairment

- Purported "higher unit costs" are irrelevant.
  - As D.C. Circuit recognized, impairment must consist of more than the usual challenge of playing catch-up that any new entrant into a mature industry faces.
- Determining whether demand justifies investment is simply a normal business risk.
  - In many industries with high entry costs (*e.g.*, airlines, DBS, PCS) competitors build facilities and prepare to compete before they have any assurance of attracting any customers.

Financial Conditions Do Not Justify Unbundling

- A plethora of alternative facilities already exist — even if a carrier exits the market, its facilities will remain available, and at fire sale prices.
- Capital markets are tight, but not closed to CLECs with good business plans.
  - CLECs continued to receive funding in 2002: Level 3 — $500 million, Williams — $150 million, DSL.net — $35 million, Broadview Networks — $40 million, Yipes — $50 million, New Edge Networks — $15 million in cash and $131 million in converted debt, *etc.*
- Availability of UNEs would reduce capital flow to facilities-based carriers because the facilities they seek to build would have to compete with UNEs.

"Operational Difficulties" Do Not Make Alternatives Impractical

- Rights-of-way issues cannot be used to create impairment where it does not exist.
  - Where ILECs have existing rights-of-way, CLECs can share them.
  - Where ILECs do not, ILECs have no advantage.
  - To the extent access to rights-of-way is a problem, it should be addressed directly.

Competitive Triggers

- No unbundling of high-cap loops and transport at DS3 and above, including dark fiber.
- No unbundling of DS1 loops and transport at wire centers:
  - with 2 or more fiber-based collocators,
  - with at least 15,000 business lines, or
  - that generate $150,000 or more in monthly Special Access revenue.

DS3 and above loops and transport

- Market evidence shows that, at DS3 and above, traffic and revenue justify deployment of alternative facilities
  - CLECs have purchased only 140 DS3 loops nationwide and *none above DS3,* and thus do not need ILEC facilities.
  - AT&T concedes that ILECs provide only **Begin Proprietary XX End Proprietary** percent* of its DS3 tails. (Presumably, ILECs account for even less of AT&T's DS3 transport).
  - Given their network architectures, if CLECs do not need DS3 loops, they certainly do not need DS-3 transport.
- This exclusion also should apply to dark fiber, which is used to carry large amounts of traffic.

* Proprietary

DS1 Loops and Transport

- In wire centers with 2 or more fiber based collocators, alternative high-cap facilities are available, and DS1 loops and transport should not be unbundled.
  - This criterion is conservative; it does not account for complete by-pass or non-fiber-based collocation.
  - If it makes sense to deploy fiber transport, it also makes sense to deploy high capacity loops because high capacity loops are just extensions of existing fiber rings.

Fiber is Sensibly Duplicable in Many Wire Centers

- CLECs can and do use alternative sources of fiber in a significant number of wire centers:
  - with at least 15,000 business lines, and
  - that generate at least $150,000 in monthly special access revenue. *See tables 1 and 2.*
  - These criteria are conservative; they do not account for complete by-pass or non-fiber-based collocation
- Competitive fiber thus is sensibly duplicable in such wire centers.

Competitive Indicators: Business Lines

Collocation by Business Lines						
	SBC Wire Centers (out of a total of 3,217)		SBC Wire Centers With One or More Fiber-Based Collocators		SBC Wire Centers With Two or More Fiber-Based Collocators	
Business Lines	Wire Centers	% of All Wire Centers	Wire Centers	% of Wire Centers*	Wire Centers	% of Wire Centers*
5,000-10,000	403	13%	60	14.9%	11	2.7%
10,000-15,000	240	7%	55	22.9%	14	5.8%
15,000-20,000	142	4%	53	37.3%	31	21.8%
20,000-25,000	80	2%	40	50.0%	18	22.5%
* Percentage of wire centers that meet business line criteria.						

Competitive Indicators: Special Access Revenue

Collocation by Special Access Revenue						
	SBC Wire Centers (out of a total of 3,217)		SBC Wire Centers With One or More Fiber-Based Collocators		SBC Wire Centers With Two or More Fiber-Based Collocators	
Revenue ($)	Wire Centers	% of All Wire Centers	Wire Centers	% of Wire Centers*	Wire Centers	% of Wire Centers*
50,000-100,000	370	12%	48	13.0%	11	3.0%
100,000-150,000	203	6%	57	28.1%	16	7.9%
150,000-200,000	126	4%	44	34.9%	18	14.3%
200,000-250,000	73	2%	32	43.8%	15	20.5%
* Percentage of wire centers that meet revenue criteria.						

No Impairment Without Access to EELs

- No impairment without UNEs as a substitute for special access, or to provide long distance and wireless services.
  - Competition for special access is flourishing — CLEC market share is 28 percent to 39 percent.
  - Market characteristics (few customers with high volume in discrete areas) facilitate market entry.
  - Carriers successfully using special access to provide the services they seek to offer cannot be impaired without UNEs to provide such services.
- The FCC cannot, consistent with *USTA v. FCC*, allow UNEs to be used in competitive markets.

EELs Conflict with the Goals of the Act

- Undermines facilities-based competition where it is most advanced.
- Subjects special access to price regulation more onerous than when it was a monopoly service.
- Windfall for IXCs and large users at expense of basic consumers.

EELs Limited to Local Service

- At a minimum, high-cap loops and transport unbundled only where used to provide a significant amount of local service.
  - Existing safe harbors are workable, as FCC has found.

Conclusions

- Competition is flourishing in the business-focused market of high cap loops and transport
- A myriad of alternatives exist to the ILEC facilities
- Forced access undercuts investment
- At a minimum, competitive indicators should be used to permit limited unbundling of DS1 loops and transport for the provision of local service.